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CITATIONS

828398—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 556

LEONA H. BETHEA, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF CATHERINE HENKE, PETITIONER

v.

FRANK SCOFIELD, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 64–71), is reported in 74 F. Supp. 31. The opinion of the Court of Appeals is reported in 170 F. 2d 934. (R. 78–86.)

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1948. (R. 87.) The petition for writ of certiorari was filed February 9, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the value of the corpus of the trust in question is includible in the decedent, Catherine Henke's, gross estate, as a transfer intended to take effect in possession or enjoyment at or after her death, within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

2. Whether the value of the trust corpus is includible in her gross estate as a transfer made in contemplation of her death within the meaning of that section.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations involved are presented in the Appendix, *infra*, p. 14.

STATEMENT

The primary issue here presented is whether the value of a transfer in trust made by the decedent, Catherine Henke, in her life time, pursuant to the provisions of a joint will executed by herself and her husband, is includible in her gross estate at her death for estate tax purposes, either as a transfer intended to take effect in possession or enjoyment at or after her death or as one made in contemplation thereof, within the meaning of Section 302 (c) of the Revenue Act of 1926.[1]

[1] The Court of Appeals found is unnecessary to pass upon the Government's contention that the taxpayer was estopped from maintaining this suit because of its agreement to com-

The case was tried to the court without a jury, primarily upon a stipulation of facts, and upon the testimony of three witnesses. The findings follow the stipulation and are substantially as follows:

Catherine Henke, the decedent in question, died November 19, 1936. (R. 65.)

On June 10, 1932, she made a will and on May 6, 1935, a codicil thereto. (R. 65.)

On December 31, 1936, her daughter, Leona H. Bethea, was named as independent executrix (R. 2, 66) and on September 20, 1937, she filed, with the Collector of Internal Revenue for the First Collection District of Texas, a return for the estate of the decedent, showing a net estate in Schedule P thereof of $223,593.12 and a net estate in Schedule Q thereof of $283,593.12. The tax shown on the return after claiming credit for state inheritance taxes in the sum of $4,354.98 was in the sum of $38,963.64, which was paid on January 12, 1938. (R. 65.)

On January 27, 1928, Catherine Henke and her husband, Henry Henke, then residents of Texas,

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promise the Government's claim for additional estate taxes by the inclusion of only 30 percent of the trust estate in question, upon which agreement the Government relied in assessing the deficiency in tax. If this Court should grant the taxpayer's petition for certiorari, the Government will renew this contention as additional, independent support for the judgment below.

made and executed a joint will. Henry Henke was sick when this will was published and died on February 18, 1928. On February 22, 1928, his widow, Catherine Henke, in pursuance of Clause VII of this will, made and published a codicil thereto. (R. 66.)

On May 15, 1928, the joint will and codicil were probated as the will and codicil of Henry Henke, deceased, in Harris County, Texas, and the Houston Land & Trust Company thereupon qualified as executor under the will. (R. 66.)

The joint will provided that if Henry Henke should die before Catherine Henke, she should be paid during her lifetime the sum of $40,000 a year out of the net revenue of the joint property; that if the net revenue was insufficient for such purpose, then the principal of the joint property should be resorted to; and that if the net revenue of the joint property would so justify, then the annual payments to Catherine Henke should be increased to $50,000. The joint will further provided that, after the death of Henry Henke, Leona Bethea, daughter of Henry and Catherine Henke, should be paid annually the sum of $25,000 out of the net revenue of the joint property; that if the net revenue was insufficient for such purpose, then the principal of the joint property should be resorted to; and that if the net income of the joint property would so justify, then the annual payments to

the daughter should be increased to $35,000. It was further provided in the joint will that at the expiration of eight years after the death of both Henry and Catherine Henke, the balance of the estates should be turned over to the daughter Leona Bethea, and if she be not living at that time, then the property should be retained by the trustee for an additional five years and then turned over to the children of Leona Bethea. (R. 35, 38.)

Under the terms of this will, the entire community estate of Henry and Catherine Henke passed to, vested in, was actually delivered to and was taken possesion of by the Houston Land & Trust Company. The company proceeded to administer the estate as such executor until July 1, 1929, at which time it closed its books as executor and opened its books as trustee under the joint will. During the period of administration, the executor administered the entire community estate of Henry and Catherine Henke and paid and discharged out of it all claims against such community estate and paid all specific bequests and annual allowances provided for in the joint will and codicil in accordance with the terms of those instruments. The bequests provided for in the codicil and in Paragraphs numbered I and II of the joint will, and all other disbursements made during the administration, were paid, one-half out of the prop-

erty of Henry Henke and the other half out of the property of Catherine Henke. At the close of the period of administration under the joint will and codicil, the Houston Land & Trust Company, as trustee, opened two trust accounts. One of these was carried in the name of "Estate of Henry Henke, Deceased," and the other in the name of "Mrs. Catherine Henke, Trust." As trustee, the Houston Land & Trust Company divided the residue of the community estate (thenceforth to be accounted for by it as trustee) between the two trust accounts, placing property valued at $1,381,846.88 in each account; and, since July 1, 1929, the trustee has at all times treated and administered the two accounts as separate trust estates in accordance with the provisions of the joint will. (R. 66–67.)

Catherine Henke had accumulated a separate estate after the death of Henry Henke, and the executrix, in making and filing the estate tax return above referred to, included therein only the value of this accumulated separate estate. On November 19, 1936, the net value of the Catherine Henke Trust in the hands of the Houston Land & Trust Company, trustee, amounted to the sum of $1,289,217.92. In a report dated November 15, 1939, the Internal Revenue Agent, Fred B. Lowery, recommended to his superiors in the Bureau of Internal Revenue that the net value of the Catherine Henke Trust as of November

19, 1936, be included in the estate of Catherine Henke as taxable property. On account of this and other corrections of the return, he recommended an additional assessment in estate tax in the sum of $398,836.35. (R. 67–68.)

The report of the revenue agent was furnished to the executrix by the Internal Revenue Agent in Charge on or about February 13, 1940, and thereafter she, through her accredited representatives and attorneys, protested all increases of value of the assets of the estate recommended by the revenue agent and also the inclusion of the corpus of the Catherine Henke Trust in the gross estate. (R. 23, 68.)

At a conference held at San Antonio, Texas, on April 17, 1940, at which the Commissioner of Internal Revenue was represented by John Trimble and Fred B. Lowery, Internal Revenue Agents, and the executrix was represented by W. N. Aikman, her attorney in fact, it was agreed that the executrix would accept all changes recommended by the revenue agent except that 30 percent only of the value of the Catherine Henke Trust was to be included in the gross estate. In other words, the value of this trust was included in the gross estate only to extent of $386,765.37, instead of $1,289,217.92; and on behalf of the executrix it was then and there agreed that she would furnish the waiver mentioned in the next paragraph. (R. 23, 68.)

Pursuant to the agreement mentioned in the preceding paragraph, the executrix delivered to the representatives of the Bureau of Internal Revenue a waiver of restrictions against immediate assessment and collection of the deficiency agreed upon, wherein she agreed not to file or prosecute a claim for refund and further agreed upon request of the Commissioner to execute at any time a final closing agreement under Section 3760 of the Internal Revenue Code. (R. 68–69.)

Thereafter, based on the recommendations of Revenue Agents Lowery and Trimble, the Commissioner of Internal Revenue included only 30 percent of the value of the Catherine Henke Trust on November 19, 1936, in the gross estate of Catherine Henke, deceased, and assessed a deficiency in estate tax of $91,431.84 and interest of $12,358.32, a total of $103,790.16, which was paid by the executrix to the Collector on June 10, 1940. Of the deficiency so assessed, $77,168.10 and $10,430.35 interest (a total of $87,598.45), was attributable to the inclusion in the gross estate of the 30 percent of the value of the Catherine Henke Trust, i. e., $386,765.37. (R. 69.)

On May 20, 1943, the executrix for the estate of Catherine Henke, deceased, filed a claim for refund of the tax so paid on June 10, 1940. (R. 69.)

The claim for refund was rejected by the Commissioner of Internal Revenue, who gave notice

of such rejection by registered letter dated November 11, 1943. (R. 69.)

At all times subsequent to Catherine Henke's death the corpus of the Catherine Henke Trust exceeded one million dollars in value and at all times the annual net income from the joint property held in trust by the Houston Land & Trust Company has exceeded $40,000 per year. (R. 69.)

Th joint will of Henry and Catherine Henke has never been filed for probate as the last will and testament of Catherine Henke. (R. 69–70.)

The District Court found that the transfer made by Catherine Henke in 1928 was not made in contemplation of death and that it was not intended to take effect in possession or enjoyment at or after death. The District Court further said that it did not find any evidence that the Commissioner of Internal Revenue had held or found as a fact that the transfer was made in contemplation of death. (R. 70.)

Finally the District Court found that the waiver executed by Leona Henke Bethea under date of April 18, 1940, was not executed by the Secretary of the Treasury, and that there was no evidence that it was accepted or authorized by him, and that its execution did not mislead the Collector of Internal Revenue or any officers of the Government as to any fact or facts material in this case. (R. 70.)

On the basis of the facts found the District Court concluded that the transfer was not made

in contemplation of death or intended to take effect in possession or enjoyment at or after the testator's death, within the meaning of the applicable statute, namely, Section 302 (c) of the Revenue Act of 1926, as amended; and that the sums paid as bequests under the joint will of January 27, 1928, to the extent paid from the property of the estate of Catherine Henke, were not includible in her estate as gifts made in contemplation of death. (R. 70–71.)

And finally, the District Court concluded that the case of *Commissioner* v. *Masterson,* 127 F. 2d 252 (C. A. 5th), was applicable to the facts in this case, and that, under the facts in the case at bar and the rule laid down by that decision, as a matter of law, Mrs. Catherine Henke, by having the will of her husband probated and accepting the benefits under the will, waived her original community interest in the property disposed of by the will and became bound by the terms of the will and covenant. (R. 71.)

Accordingly, the District Court directed the entry of judgment carrying into effect its findings of fact and conclusions of law. (R. 71.)

The Court of Appeals reversed the District Court's decision on the ground that the transfer in trust was one intended to take effect in possession or enjoyment at the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926, and also because it was made by the decedent in contemplation of her death. (R. 84.)

ARGUMENT

The decision of the Court of Appeals was based upon what it considered to be the clear intention of decedent and her husband, evidenced by their joint will, to make a testamentary disposition of his or her respective interest in their community property (R. 81) and upon the court's interpretation of Texas law (R. 82–84).

The petitioner urges (Pet. 18–29) that the court below has misconstrued state law. That the court's construction of state law was not clearly wrong would seem plain from *Bethea* v. *Sheppard,* 143 S. W. 2d 997, where the Court of Civil Appeals of Texas interpreted the joint will here involved and held that inheritance taxes were due to the State of Texas. Under the circumstances, it is submitted that review by this Court of the holding below on the question of state law is not warranted. Cf. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701.

The petitioner urges (Pet. 30) that if the holding below that the transfer was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926 was based on the fact that she was to receive $40,000 a year out of the net income of the joint property, then the decision is in direct conflict with *Hassett* v. *Welch,* 303 U. S. 303. This contention is answered by *Commissioner* v. *Estate of Church,* 335 U. S. 632.

The petitioner finally urges (Pet. 33–35) that the Commissioner did not include contemplation of death as a ground for rejecting petitioner's claim for refund; that therefore he, in effect, held that no facts existed which would support the issue of a transfer in contemplation of death; and that this fact alone is sufficient to support the finding of the trial court that the transfer was not made in contemplation of death. While it may be true that the notice of rejection (R. 12–13) of petitioner's claim for refund (R. 46–48) did not specifically mention contemplation of death, it may be noted that neither did the claim for refund itself, although apparently that was one of the grounds discussed (R. 57) in the negotiations which led to the settlement which the petitioner seeks in this case to repudiate. The sole ground contained in the claim for refund was that, under the law of Texas, when the present decedent turned over her one-half of the community property to the executor of the estate of Henry Henke and accepted the benefits provided in the joint will, she thereby "waived" her original community interest in the property. The petitioner is thus in no position to complain of the fact that the Commissioner's notice of rejection of petitioner's claim for refund did not mention contemplation of death. The rejection notice was responsive to the claim for refund and moreover expressly referred to the settlement negotiations and stated

that the petitioner's "proposal was accepted by the Commissioner and the deficiency in tax, together with interest due thereon, was assessed against the estate pursuant to the waiver".

There is no merit to the petitioner's suggestion (Pet. 35) that since the joint will and covenant provided Mrs. Henke with an annual income of $40,000 for the rest of her life, she was acting from motives connected with life, rather than with death, when she elected to take the guaranteed income rather than her one-half interest in the community property. This annuity was no more than was produced by her one-half of the property. (See Pet. 32.) The holding of the Court of Appeals (R. 81) that each of the parties to the joint will intended to make a testamentary disposition of his or her respective interest in the community property is, we submit, in accord with the record.

The petition for certiorari should be denied.

Respectfully submitted.

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MARCH, 1949.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *.

Treasury Regulations 80 (1937 ed.):

> ART. 16 [as amended] by T. D. 4966, 1940–1 Cum. Bull. 220]. Transfers in contemplation of death.—* * *
>
> The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

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